



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: STR Painting, Inc.  
File: B-233008  
Date: December 29, 1988

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### DIGEST

Even though each individual surety proposed by a low bidder failed to disclose a single bond obligation for low bid submitted 5 days earlier under a different solicitation, as required by item 10 of the Standard Form 28, "Affidavit of Individual Surety," a contracting officer cannot automatically reject the bid, since what is involved is a matter of bidder responsibility, not bid responsiveness. Since there is no indication that sureties intentionally failed to list recent bond obligation's or that pattern of nondisclosure exists, nondisclosure does not alone support nonresponsibility determination.

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### DECISION

STR Painting, Inc., protests the rejection of its bid under invitation for bids (IFB) No. F64605-88-B-A026, issued by the Air Force for construction work to include the removal and replacement of screen doors and frames for military family housing located at Hickam Air Force Base, Hawaii.

We sustain the protest.

Seven bids were received by bid opening on September 19, 1988. STR submitted the apparent low bid of \$157,941. In response to the IFB bid guarantee requirements, STR submitted two standard form (SF) No. 24 bid bonds from two individual sureties. See Federal Acquisition Regulation (FAR) § 28.202-2(a) (bid guarantee requirements can be satisfied by the submission of bid bonds by two individual sureties, so long as each surety has sufficient net worth to cover the penal amount of the bid bond). STR also submitted two SF-28s, "Affidavit of Individual Surety," that had been filled out by each individual surety. See FAR §§ 28.202-2(a) and (b) (bidders are required to submit SF-28s whenever individual sureties are used, so the

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contracting officer can determine their acceptability). The SF-28s submitted for STR's sureties indicated both had sufficient net worth to cover the potential bond liability. In response to item 10 of the SF-28, which requires the surety to identify "all other bonds" on which he or she is surety, each surety submitted a list of contracts on which he was a surety.

On September 23, 1988, STR received an Air Force letter notifying the firm that its bid had been rejected as nonresponsive because each of the individual sureties had not disclosed an existing bond obligation. These two individual sureties had also recently submitted surety affidavits to meet the bond requirement of the low bid STR submitted 5 days earlier in response to a separate solicitation, IFB No. F64505-88-B-A056, which was also issued by the same Air Force installation. Since the surety affidavits submitted with STR's bid under the present solicitation, however, did not disclose the existence of that recent bond obligation, the Air Force rejected STR's bid as nonresponsive. STR filed a protest with our Office on October 3, 1988, against the Air Force's rejection of its bid. The award of any contract under this solicitation has been suspended pending the outcome of this protest.

In the present case, the protester does not deny that its sureties had each recently issued bid bonds under a different solicitation, IFB No. F64605-88-B-A056, the existence of which the Air Force states were not here disclosed; the protester instead explains that it received the bid bonds from the two sureties for both solicitations shortly before the scheduled bid opening of September 14, 1988, for IFB No. F64605-88-B-A056. Since the bid opening for the present solicitation was held on September 19, STR states that there was insufficient time to obtain revised surety affidavits before bid opening. STR further asserts that since both bids were submitted to the same Air Force installation, the contracting officer had knowledge of the recently incurred bond obligations. However, the contracting officer determined that since the sureties had not in fact disclosed all bond obligations, STR's bid failed to furnish a proper bid guarantee and thus was nonresponsive.

We recently addressed the precise issue raised by the Air Force's action in rejecting STR's bid for failure to list bond obligations as a result of an apparent good faith error. E.C. Development, Inc., B-231523, Sept. 26, 1988, 88-2 CPD ¶ 285. For the reasons that follow, and based on

our decision in E.C. Development, Inc., B-231523, supra, we conclude that the Air Force's rejection of STR's bid was improper.

The SF-28, "Affidavit of Individual Surety," is a document separate from the bid bond itself and serves solely as an aid in determining the responsibility of an individual surety. O. V. Campbell & Sons Industries, Inc., B-229555, Mar. 14, 1988, 88-1 CPD ¶ 259; River Equipment Co., Inc., B-227066, July 24, 1987, 87-2 CPD ¶ 84. Therefore, the contracting officer's position that STR was "nonresponsive" is incorrect. See Singleton Contracting Corp., B-216536, Mar. 27, 1985, 85-1 CPD ¶ 355; O. V. Campbell & Sons Industries, Inc., B-229555, supra. Nevertheless, a contracting agency has the discretion to consider the failure of an individual surety to disclose all bond obligations as a factor in determining the responsibility of the bidder and its sureties. Dan's Janitorial Service, Inc., 61 Comp. Gen. 592 (1982), 82-2 CPD ¶ 217; River Equipment Co., Inc., B-227066, supra.

While both individual sureties should have included the recently issued bid bonds under which they are liable, their failure to list these bonds merely puts into question their acceptability and does not justify automatic rejection of STR's bid. Rather, as indicated above, this failure is one factor that should be considered in evaluating the acceptability of an individual surety. E.C. Development, Inc., B-231523, supra.

We have held that a contracting officer has a reasonable basis to reject a bidder as not responsible in circumstances where there is an indication of a continuing pattern of nondisclosures by an individual surety, See Dan's Janitorial Service, Inc., 61 Comp. Gen. supra at 594; River Equipment Co., Inc., B-227066, supra, or where the nondisclosure causes the contracting officer to be concerned about whether the surety's net worth is sufficient to cover the bond obligations. See American Federal Contractor, Inc., B-222526, July 25, 1986, 86-2 CPD ¶ 114. Conversely, in the absence of such circumstances, we think that a contracting officer may not automatically reject a bidder, whose otherwise acceptable individual surety makes an apparent good faith effort to list its bond obligations, for the sole reason that the surety failed to list all other obligations. An inflexible policy that permits an agency to automatically reject bidders in this situation is tantamount to converting that which is clearly a matter of bidder responsibility to a

matter of bid responsiveness. See Transcontinental Enterprises, Inc., B-225802, July 1, 1987, 66 Comp. Gen. \_\_\_\_\_, 87-2 CPD ¶ 3; T&A Painting Inc., B-224222, Jan. 23, 1987, 66 Comp. Gen. \_\_\_\_\_, 87-1 CPD ¶ 86.

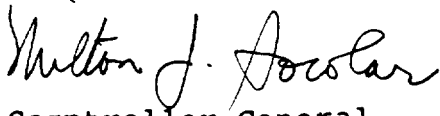
The Air Force has not alleged any other instances where either surety failed to disclose bond obligations, much less allege that this is part of a pattern of nondisclosure. Instead, the Air Force simply assumed that since the sureties each failed to disclose one existing bond obligation, they may have failed to disclose other obligations against their claimed assets. However, the Air Force admits that it contacted other contracting agencies to investigate other possible existing obligations against these sureties, but discovered none. Since the record contains no indication that the sureties intentionally failed to list their recent bond obligations or that a pattern of nondisclosure exists, we find that the nondisclosure in this case does not alone support a nonresponsibility determination.

Each surety's claimed worth is slightly more than \$2 million, which is far greater than each of their listed outstanding bond obligations of \$700,000. Although the record does not indicate the amount of the undisclosed bond, the Air Force has not questioned either surety's net worth. In fact, the Air Force admits that even if the undisclosed obligations are included in determining each surety's available assets, the sureties provide adequate financial assets and sufficient bond coverage to support STR's bid. Consequently, without further investigation, it appears that each surety had more than sufficient net worth to cover the bid bond in question here. Compare American Federal Contractor, Inc., B-222526, supra (where the individual surety's nondisclosures of bond obligations properly caused an agency to be concerned about the surety's net worth).

We recognize that a contracting officer has broad discretion in making responsibility determinations. However, here the record indicates he did not reasonably exercise his judgment concerning the surety's acceptability, but instead rejected the bid without otherwise investigating the surety's acceptability and responsibility. See O. V. Campbell & Sons Industries, Inc., B-229555, supra at 2. We therefore sustain the protest.

We are recommending, by separate letter of today, that the Air Force determine whether the offered individual sureties are acceptable in accordance with the guidance set forth in this decision. If the Air Force determines that they are acceptable sureties, award should be made to STR, if

otherwise proper. Further, under the circumstances, we find that STR is entitled to the costs of filing and pursuing its protest. Kirila Contractors, Inc., B-230731, June 10, 1988, 67 Comp. Gen. \_\_\_\_\_, 88-1 CPD ¶ 554.

for   
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